could have had no effect of any kind on the proceeding even if it had not also failed to satisfy the formality requirements of the *ex parte* rules.

3. On July 10, 1991, Press filed a document entitled "Informal Objection" ("reincorporating by reference" the first "Informal Objection"), opposing grant of BMPCT-910625KP, a Rainbow request for extension of time to construct. Like the original opposition, this pleading was denominated in its caption an "informal objection" and therefore failed to satisfy the requirements of Rule 1.1202(e)(1)(i). Press' third pleading accordingly did not affect the exempt status of the proceeding.

4. On January 7, 1992, Press filed a document entitled "Informal Objection and Request to Hold Application in Abeyance," opposing BTCCT-911129KT, a Rainbow application for pro forma transfer of control. Once again, this document's denomination in its caption as an "informal objection" failed to satisfy the requirements of Rule 1.1202(e)(1)(i). Press' fourth pleading accordingly did not affect the exempt status of the proceeding.

5. Finally, on April 30, 1993, Press filed a document entitled "Supplement to Informal Objections," in which it responded to an April 12, 1993 filing by Rainbow providing information requested by letter of March 22,

1993 from Clay Pendarvis (Ref. 1800EI-PRG) in conjunction with Rainbow's then pending extension request. Necessarily, that document's denomination as a supplement to informal objections defined it too as, at most, an informal objection, even assuming that a supplement to a previously filed document can itself constitute an objection within the meaning of the rules. Press' fifth and last pleading prior to the meeting of July 1, 1993, like all the others, accordingly did not affect the exempt status of the proceeding.

The Inspector General's Report offers several reasons for rejecting the plain meaning of the rules as outlined above. None bears scrutiny. First, it is contended (Report, page 5) that in informal discussions with unnamed personnel in the Office of the General Counsel the Inspector General was advised that the General Counsel believed the February 25, 1991 Petition for Reconsideration, which related to an earlier extension request than the one at issue in the July 1, 1993 meeting, to be a formal opposition within the meaning of the rules.

According to the Report, it is the General Counsel's view that the filing of that pleading restricted the extension of time proceeding to which it related and that all subsequent proceedings remained restricted despite

the fact that Press' filings in those proceedings were not formal because "the issues involved were the same or so intertwined with the issues raised by the Petition for Reconsideration that was still pending, that the matter remained restricted." Report, page 5. Even this explanation, however, does not account for restricting the 316 proceeding.

Without knowing what the anonymous source in the General Counsel's office was told or exactly what s/he said, it is difficult to comment on this opinion. However, Rainbow is inclined to suspect that the opinion in fact given was that a petition for reconsideration is a formal pleading sufficient to restrict a proceeding. Rainbow does not disagree with that general proposition. However, as explained above, this particular petition for reconsideration did not fit within that general rule because it failed to meet the requirements of the *ex parte* rules for a formal pleading or even the general requirements of Rule 1.106 for filing in the first place: It was inadequate under the *ex parte* rules because its text conceded that it was an informal objection; it was a prohibited pleading because reconsideration of informal objections does not lie; and it would in any event have been ineligible for consideration because Press failed to

show either that it could have participated at an earlier stage or that it was injured by grant of the extension of time to construct. To find, as the Inspector General does, that a pleading which is both inadequate under the ex parte rules and ineligible for filing or consideration under requirements applicable to all petitions for reconsideration, can nonetheless have the effect of transforming an exempt proceeding into a nonexempt one would make a mockery of the Commission's unambiguous rules and precedent.7/

As a separate matter, the notion that different proceedings become one for purposes of the *ex parte* rules if they involve similar issues is without authority and contrary to the text of the *ex parte* rules and the dictates of common sense. Rule 1.1202(d), which defines an adjudicative proceeding, makes clear the fact that each application or petition constitutes such a proceeding for purposes of the rules. Since the gist of Press' allegations against Rainbow is that Rainbow is not a fit licensee, the Inspector General's reasoning would lead to the bizarre result that for so long as Rainbow operates its

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7/ It is particularly irksome that the only reason this argument is even available to the Inspector General is that the Commission failed for some three years, despite Rainbow's vigourous urgings, to dismiss this prohibited filing and it therefore still reposes in the record.

station any authorization it may hereafter seek, including all renewals, will be restricted.

Even if the Report means to suggest that all proceedings involving Rainbow remain restricted only for so long as the Commission fails to act on the 1991 petition, the result is different but no less bizarre in its implications. Such a ruling means that the applicability of the *ex parte* restrictions to a proceeding is determined not by the rules and the facts of that proceeding but by the diligence of the Commission's staff in ruling on outstanding pleadings in earlier separate proceedings involving similar issues. The legal and logical inadequacies of such a theory are self evident.

The Inspector General's opinion that this was a restricted proceeding does not rest solely on the 1991 reconsideration petition. The Report concludes (at pages 5-6), contrary to the reported view of the General Counsel, that all other Press filings also qualified as formal notwithstanding their own denomination as "informal." This view derives from the Inspector General's reading of the text of Rule 1.1202(e)(1)(i). While the Rule provides that "the caption and text" of a pleading must "make it unmistakably clear" that it is intended as a formal opposition, the Inspector General finds it

sufficient that the caption or the text so indicate. It is not at all clear to Rainbow how the text of a pleading whose author voluntarily denominated it as "informal" in its caption can be so read as not simply to override that specific self description but also to do so with the requisite unmistakable clarity. Nor, apparently, was it clear to the Office of the General Counsel, since the Report concedes that interpretation of the rules is for the General Counsel, who does not share the Inspector General's view that the Rule should be read disjunctively rather than conjunctively.

Press made a conscious decision to file informal objections because it lacked standing to file formal objections. If the Inspector General's view were to prevail, an objector with no legal right to become a party to a proceeding could nonetheless achieve the benefits of that status by manipulation of the *ex parte* rules, rules which neither in terms nor intent are designed to permit circumvention of the statutory and regulatory rules of standing.[8/]

8/ Rainbow has several times addressed the matter of Press' standing. It suffices to say that because none of the post-grant authorizations which have here been challenged can have the effect of aggrieving Press, which did not seek intervention in the licensing proceeding, it cannot establish standing either before the Commission, *see Tele-visual Corp.*, 33 F.C.C.2d 418 (1971); *Coronado Communications Company*, 8 F.C.C. Rcd. 159, 160 (BB 1992),

The Inspector General also relies on a 1991 letter from the Managing Director advising an Orlando citizen that the proceeding was a restricted one. Report, page 6. However, that correct ruling had no effect on the exempt status of the proceeding under Rule 1.1204(a)(1) and it is that status which made the July 1, 1993 meeting entirely proper under the Rules. As the NOTE to Rule 1.1204(a)(1) specifically sets out:

> In proceedings exempted by Rule 1.1204(a)(1) . . . , oral ex parte communications are permissible, but only between the Commission and the formal party involved or his representative. Any informal objectors (whether their objections are oral or written) are subject to ex parte procedure set forth in Rule 1.1208 barring oral ex parte contacts except where confidentiality is necessary to protect these persons from possible reprisals. . . .

In other words, both the citizen from Orlando and Press were prohibited from making ex parte contacts with the staff in this case but Rainbow was not. The Inspector General seems to have believed that once the Managing Director described the proceeding as restricted, the

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or before the courts, *see California Association of Physically Handicapped v. F.C.C.*, 778 F.2d 823 (D.C. Cir. 1985). Moreover, apart from the standing problem, consideration of Press' filings would be barred by Section 309(d)(1) of the Act because all rest on speculation, surmise and innuendo and none has ever been accompanied by affidavits of persons with personal knowledge. The fact that pleadings are informal does not exempt them from the normal evidentiary requirements. *See Christian Broadcasting Association*, 77 F.C.C.2d 858 (1980); *KHVC, Inc.*, 77 F.C.C.2d 890 (1980).

matter was at an end and all persons, including the applicant and the staff were prohibited from communicating *ex parte*. That is not the case, however. If, as here, a proceeding is exempt, then the applicant may speak to the staff *ex parte*, but objectors may not.

III. THE INSPECTOR GENERAL'S REPORT IMPROPERLY FAULTS BUREAU STAFF FOR NOT TREATING THE PROCEEDING AS RESTRICTED.

The Inspector General's recitation of the events leading up to the July 1, 1993 meeting between Bureau staff and Rainbow's counsel and president is highly prejudicial by implication. Before addressing the specific unfair implications, Rainbow notes that the individuals with collective F.C.C. experience of over 80 years, Roy Stewart, Clay Pendarvis and Margot Polivy, independently concurred in their understanding that the proceeding was not restricted and that an informal objection cannot be the basis for restricting an otherwise exempt proceeding. See Report, pages 8, 9, 11. Nonetheless, the Inspector General adhered to his erroneous conclusion that an informal objection becomes a "formal objection" if it appears that formal opposition was the subjective intent of the objector. Report, pages 5-6.

Moreover that apparent subjective intent is deemed to control even the expressed intent of the objector

since it was here unmistakably clear and explicit that "informal oppositions" were intended by Press. And in arriving at his finding of such intent here, it is apparently the Inspector General's understanding that the "formal opposition" definition provided in Commission Rule 1.1202(3)(1)(i) may appropriately be abandoned, at least in this case, and "formal opposition" be taken to mean simply "serious opposition." This abandonment of both the Rule and an objective, universally applicable legal standard is admittedly not the view of the Office of General Counsel, but the Inspector General apparently thinks his interpretation is easier to apply than the Rule as written, Report, page 5. Nonetheless, he also recognizes that "it is OGC not OIG that interprets the rule for the Commission," Report, page 6.[9/]

The Report (at page 6) suggests wrongdoing on the part of Antoinette Bush, notwithstanding the innocuous nature of her conversation with Roy Stewart, in which she asked him what was going on and the opinion of Clay Pendarvis that her telephone enquiry to him was a status

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9/ While the question of the effect of Press' Petition for Reconsideration has already been addressed, it is particularly difficult to comprehend how, after admitting that OIG's interpretation of the ex parte rules is in conflict with OGC's and that OGC's interpretation controls as a matter of law, the Inspector General can have no hesitation in finding a clear violation of that rule by the Bureau's senior staff.

enquiry, appropriate regardless of the status of the proceeding. Apparently, the Inspector General found her calls sinister because Rainbow's counsel informed Ms. Bush of the Bureau's letter denying Rainbow's extension. The Report's conclusion (at page 11) that Ms. Bush was precluded from making a status enquiry if the proceeding was restricted-- which in any event it was not[10/]-- is wrong. Status enquiries are never precluded. See Rule 1.1202(a) NOTE.

It is unfortunate that in an apparent effort to buttress his fundamentally flawed opinion that any ex parte transgression occurred, the Inspector General has gratuitously impugned the reputation of Antoinette Bush, then Counsel to the Senate Subcommittee on Communications, who did nothing more than initiate a routine enquiry in a matter in which she had no cognizable interest. At the very least this review should remove that unnecessary and inappropriate stain.

One other respect in which the Report is both wrong and misleading is its apparently unalloyed acceptance of the self serving and in some respects ascertainably

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10/ Nor had Ms. Bush any reason to believe otherwise. As the Inspector General found, she noted that "sometimes when she calls the FCC about a particular matter she is informed that the proceeding is restricted and that they can't talk about it. In this case, however, no one said that to her." Report, page 7.

erroneous statements of Paul Gordon. Mr. Gordon is quoted as having recited several "facts" which did not occur:

1. Mr. Gordon stated (Report, page 7) that Clay Pendarvis concurred with his rendition of the applicability of the *ex parte* rules prior to the meeting on July 1, 1993. Mr. Pendarvis (Report, page 8) and Margot Polivy (Report, page 10) say that Pendarvis saw no *ex parte* problem.

2. Mr. Gordon claims to have previously told counsel for Rainbow that the proceeding was restricted (Report, page 7). This statement is not correct. No such statement or suggestion was ever made to me by Mr. Gordon. In fact, his response to my June 24, 1993 question about meeting with Messers Pendarvis and Stewart would suggest that he held a contrary view at the time.

3. Mr. Gordon claims that he knew before the meeting that Roy Stewart "was not happy with the decision" denying Rainbow's extension request and that after the meeting Stewart "indicated to him how the [reconsideration] letter should be written" (Report, page 8). Neither Mr. Stewart nor anyone else on the Bureau staff other than Mr. Gordon believes Roy Stewart directed an outcome favourable to Rainbow on reconsideration.

4. Finally, Mr. Gordon stated (Report, page 8) that he believed Margot Polivy's presentation in the July 1, 1993 meeting was misleading in some unspecified respects but was cut off by Roy Stewart when he tried to say so. This statement is uncorroborated by the other staff attendees, Clay Pendarvis (Report, page 8) and Barbara Kreisman (Report, page 9). Roy Stewart himself was apparently never even asked. Since I too was present, I can say of my own personal knowledge that it did not happen. Rainbow knows of no error in the information presented at the meeting. Moreover, Rainbow is likewise unaware of any information presented at the meeting that was not subsequently submitted under oath as part of its July 2, 1993 reconsideration petition. And the Commission's opinion granting the Petition, which was written by Mr. Gordon himself (Report, page 9), identifies no such error or misrepresentation as Mr. Gordon now claims to have recognized.

The likeliest explanation for Mr. Gordon's recollection by animus is that he made a bad decision in denying Rainbow's application and was embarrassed when it came to the attention of his superiors. The same thing has happened no doubt to every young staffer. That is not, however, a justification for fantastical post hoc

recollections and accusations designed to justify the error.[11/]

In short, the factual recitations of every person involved other than Paul Gordon-- Roy Stewart, Barbara Kreisman, Clay Pendarvis, Antoinette Bush and Margot Polivy-- are in every significant respect consistent. The only person whose factual recitation is at odds with that of any of the others is Paul Gordon. No one but Mr. Gordon had any doubt that no *ex parte* restriction applied to this proceeding. Indeed, no one, except possibly Mr. Pendarvis on the day of the scheduled meeting, has any recollection that Mr. Gordon ever previously expressed his after the fact contention of an *ex parte* violation.

11/ Rainbow views the Inspector General's decision to include this statement in his Report without requiring Mr. Gordon to identify the relevant falsehood and without raising the allegation in his interviews with any of the other staff members or counsel for Rainbow as unprofessional and irresponsible, particularly in the context of these rules and in light of his indulgence of so fine a punctilio about them as to ignore their plain meaning and revise their scope to prohibit any lawful contact that anyone unfamiliar with the *ex parte* rules might find questionable. In presenting to the Commission (even assuming he had no idea that his Report might also be publicly circulated and become the object of extensive media discussion) what amounts to no more than spiteful gossip and innuendo, the Inspector General does gratuitous injury to the reputation of Rainbow's counsel and casts a shadow on what is perhaps the most important aspect of the basic qualifications of a permittee-- his candor and truthfulness to the Commission.

IV. THE INSPECTOR GENERAL'S READING OF THE EX PARTE RULES IS UNSOUND AS A MATTER OF POLICY.

As a policy matter, the Inspector General's reading of the *ex parte* rules deprives them of the ability to perform their central function of providing clear guidance on when it is permissible and when prohibited to communicate with Commission staff on the merits of a pending proceeding. It was clear to counsel for Rainbow at the time of the interview with the Inspector General's representative that he viewed the overriding purpose of the rules as being to ensure an appearance of propriety in all dealings with the Commission. Under that view, which is reflected as well in the Report, the general rule guiding statutory construction is that whatever is not expressly permitted is prohibited. The rules as written, however, are intended to specify what is prohibited and Rainbow submits that that is as it should be.

Counsel for Rainbow attempted at the time of the interview to make clear the fact that there are important reasons why applicants/licensees and their representatives should be encouraged to speak to the Commission staff, that providing such assistance is a central function of the Bureau and serves the interest of the public as well as the parties involved. The Report's view of the rules as being essentially concerned with

preventing any appearance of impropriety creates a situation in which their applicability to a given situation is largely subjective and possibly even post hoc. Under such circumstances the primary effect of the rules-- and this appears to be the Inspector General's intention-- would be to discourage the staff from engaging in any *ex parte* contacts in any case in order to be sure of avoiding what might later be found to have been an improper contact.

Rainbow is able to testify that precisely such an effect has been achieved here. Not only has the entire Bureau recused itself from considering any Rainbow filing, but the permittee has been largely unable even to get its phone calls returned on matters having absolutely nothing to do with the various extension/transfer requests which are the subject of the Inspector General's investigation, notwithstanding the fact that it is required by the terms of its outstanding construction permit to go on the air by the end of this month.

The Commission's legitimate administration of the public's interest in the initiation of new television service by a 100% minority owned applicant has come to a halt. Rainbow has invested $3 million in the construction of channel 65 and spent or committed well over $2

million more in programing and other operational areas. It is ready to commence program testing but it cannot do so because the Mass Media Bureau has for no legitimate or legal reason been incapacitated from processing Rainbow's application.[12/]

If the rules are intended as guidance for the staff and the public, the Commission must write them in a clear manner and enforce them as written. If the Commission believes the *ex parte* rules are unclear, or if it believes that what is now permissible or prohibited behaviour should be modified, then the normal rulemaking process should be followed. It is legally wrong and unfair to depart form the written rules as the Inspector General has done[13/] and assert wrongdoing on the part of the senior Mass Media Bureau staff and Rainbow.

12/ Even assuming arguendo that the proceeding were restricted, the Inspector General admits both that Rainbow's counsel appears "sincere" in her belief that it is not (Report, page 11) and that the rules-- given the Inspector General's interpretation-- are unclear and lead to "unintentional violations" (Report, pages 14-15). The likelihood of sanctions against Rainbow would thus appear remote. Moreover, if the Commission were ultimately to conclude that sanctions were warranted, imposition of such sanctions would not be affected by Rainbow's operational status. By delaying inauguration of service, on the other hand, the Commission unnecessarily injures the public and deprives Rainbow of due process of law.

13/ While the Report suggests at page 5 that the Office of the General Counsel concurred with the interpretation of this proceeding as restricted by Press' February 25, 1991 Petition for Reconsideration, no such

Finally, as a matter of prudent policy and fundamental fairness, Rainbow and Antoinette Bush should have been given the opportunity to review and comment on the Report before it was made public. At the very least, they should not have been required to learn of its release through calls from the press. It is highly prejudicial to Rainbow and injurious to the reputation of people who have done nothing wrong to have such a report released with no notice.[14/] As evidenced by the factual inaccuracies detailed in Parts I and III above, it is clear that quite apart from considerations of elemental fairness, the Inspector General's investigation would have benefited from that review.

CONCLUSION

Rainbow believes the Inspector General's Report is legally wrong. The proceeding was not restricted and no wrongdoing occurred on the part of the staff of the Mass Media Bureau, Antoinette Bush or Rainbow. It is important that the Commission make this fact unequivocally

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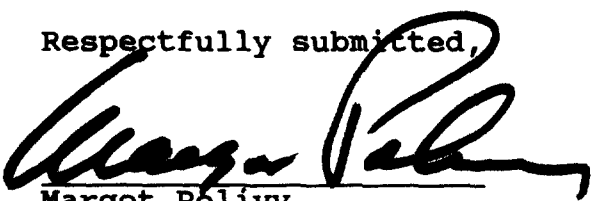
opinion was appended to the Report and Rainbow has had no opportunity to review that opinion. However, for the reason set forth in Part II of these Comments, *supra*, Rainbow believes that that pleading did not constitute a formal objection for purposes of the *ex parte* rules.

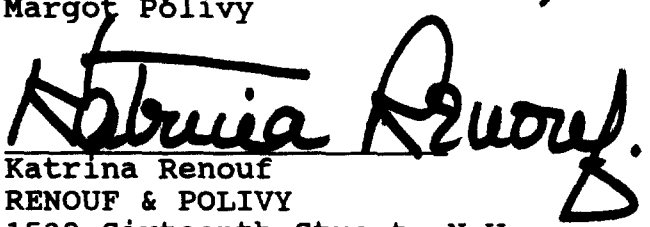
14/ Counsel for Rainbow had asked to see the Report at the time the Inspector General's representative interviewed her and was told it was an internal matter and she would not therefore be given an opportunity to comment.

clear. Moreover, this whole matter could be brought to a conclusion, along with the various pending court proceedings brought by Press, if the Commission would act on the long pending pleadings and applications to which Press' various objections have been addressed.

Respectfully submitted,



Margot Polivy



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22 March 1994

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Comments of Rainbow Broadcasting. Ltd. were sent by first class mail, postage prepaid, this twenty second day of July 1993 on the following:

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